Bank of China (M) Bhd v Fivestar Development (Puchong) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-252–06 OF 2017
LAU BEE LAN J
31 JANUARY 2018

Civil Procedure — Summary judgment — Whether any triable issues raised — Whether acceptance of settlement of debt by conduct existed — Whether claim for unjust enrichment sustainable — Rules of Court 2012 O 14

Through a letter of offer dated 14 February 2005 ('the said letter of offer') and at the request of the first defendant, the plaintiff granted the credit facility of RM16m to the first defendant comprising of term loan facility with limit of RM7m; bridging facility — first overdraft for the principal of RM6m; and second overdraft for the principal of RM3m ('the said facilities'). Upon request by the first defendant, the plaintiff agreed to revise the terms and conditions of the facilities. The terms and conditions of the letter of offer and the supplementary letter were reduced into a facility agreement dated 27 June 2005 ('the said facility agreement') in which the first defendant agreed to all the terms and conditions contained therein. Through a guarantee and indemnity agreement dated 27 June 2005, the second defendant, Tan Lai Kim and Tan Poh Chai jointly and severally agreed to guarantee the repayment of the first defendant's liability. Subsequently, upon request by the first defendant, the plaintiff agreed to alter the terms and conditions of the letter of offer which the plaintiff reduced the facilities to RM3m. The plaintiff had released and discharged the debenture, mortgages and Tan Lai Kim and Tan Poh Chai as guarantors of the first defendant. The plaintiff through its solicitor issued a letter of demand to the defendants to claim the amount in excess of RM241,055.38. After receipt of letter of demand dated 12 April 2017, the defendants made payment of RM125,000 to the plaintiff. The plaintiff alleged that the first defendant had breached the terms and conditions of the said facility agreement whereby it failed, neglected and/or refused to pay the amount in excess. Subsequently, the plaintiff terminated the facilities and demanded for the amount outstanding as prayed for in the summary judgment application which was filed thereafter on 23 June 2017. In response, the defendants made another proposal of repayment plan, among others, that the defendants would continue to serve the monthly interest and a commitment to pay RM200,000 within three months of receipt of the plaintiff's approval to withdraw the termination and recall of the facilities. The plaintiff then rejected the defendants' proposed offer to settle and with instructions to proceed with legal action for recovery of the outstanding amount. The defendants submitted

two triable issues which were: (a) acceptance of settlement of debt of RM241,000 by conduct; and (b) unjust enrichment.

Held, allowing the plaintiff's application with cost of RM4,000 to be paid by the defendant to the plaintiff:

(1) It was found that there was no merit whatsoever in the defendant's submission. In the present case, it was obvious that there could not be estoppels by conduct nor could the plaintiff be said to have acted unreasonably and wrongfully in terminating the facility agreement nor was there acceptance by conduct on part of the plaintiff. There was no acceptance of both the offers to settle as the plaintiff at first had rejected them outright in very clear and explicit terms (see paras 18–19).

(2) The plaintiff had in fact taken into account the payment of RM125,000 made by the defendant. The amount outstanding to the plaintiff was RM1,830,348.22 as at 10 May 2017 as was evident by the statement of account dated 8 September 2017 which remained unchallenged. Section 16.28 of the facility agreement and section 2.16 of the guarantee and indemnity agreement specifically provided that the defendants were contractually bound by the said clauses and a statement of account signed by manager, assistant manager and any other authorised officer of the bank was conclusive evidence of the debt due to the bank saved if the defendants could prove there was manifest error (see para 21).

[Bahasa Malaysia summary

Melalui satu surat tawaran bertarikh 14 Februari 2005 ('surat tawaran tersebut') dan atas permintaan defendan pertama, plaintif mengagihkan kemudahan kredit berjumlah RM16 juta kepada defendan pertama yang mengandungi terma kemudahan pinjaman dengan had berjumlah RM7 juta; kemudahan penghubungan merangkumi overdraf pertama untuk jumlah prinsipal sebanyak RM6 juta dan overdraf kedua untuk jumlah prinsipal sebanyak RM3 juta ('kemudahan tersebut'). Atas permintaan defendan pertama, plaintif bersetuju untuk mengubah terma dan syarat kemudahan tersebut. Syarat-syarat dan terma terma ini kemudiannya berserta surat lampiran telah dimeterai dalam satu perjanjian kemudahan bertarikh 27 Jun 2005 ('perjanjian kemudahan tersebut'). Defendan bersetuju dengan semua terma dan syarat dalam perjanjian kemudahan tersebut. Melalui satu perjanjian jaminan dan idemniti bertarikh 27 Jun 2005, defendan kedua, Tan Lai Kim dan Tan Poh Chai secara bersama dan berasingan bersetuju untuk menjamin liabiliti pembayaran semula defendan pertama. Kemudiannya, atas permintaan defendan pertama, plaintif bersetuju untuk mengubah terma dan syarat perjanjian kemudahan tersebut dengan mengurangkan jumlah fasiliti kepada RM3 juta. Plaintif telah membebaskan dan melepaskan Tan Lai Kim dan Tan Poh Chai sebagai penjamin kepada defendan pertama. Plaintif melalui peguamcara telah mengemukakan surat tuntutan kepada defendan untuk

menuntut sejumlah wang sebanyak RM241,055.38. Selepas defendan menerima surat tuntutan tersebut pada 12 April 2017, defendan telah membuat bayaran sebanyak RM125,000 kepada plaintif. Plaintif kemudiannya mengatakan defendan gagal untuk mematuhi terma dan syarat yang dipersetujui disebabkan kegagalan dan kecuaian defendan untuk membuat bayaran selebihnya dalam tuntutan yang dibuat. Plaintif kemudiannya menamatkan perjanjian kemudahan tersebut dan menuntut baki tunggakan sepertimana yang dituntut dalam permohonan penghakiman persetujuan yang difilkan pada 23 Jun 2017. Defendan membuat satu cadangan pelan pembayaran semula di mana defendan akan tertakluk pada kadar faedah bulanan dan komitmen untuk membayar sejumlah RM200,000 dalam masa tiga bulan plaintif bersetuju untuk menarik balik penamatan kemudahan perjanjian dan kembali terikat pada kemudahan tersebut. Plaintif kemudian menolak cadangan yang diberikan oleh defenfan dan meneruskan tindakan untuk menuntut baki tunggakan bayaran. Defendan telah berhujah dalam dua isu yang dibangkitkan iaitu: (a) penerimaan bayaran sejumlah RM241,000 melalui tindakan; dan (b) ketidakadilan enrichment.

Diputuskan, membenarkan permohonan plaintif dengan kos RM4,000 dibayar defendan kepada plaintif:

(1) Adalah didapati tiada merit dalam hujahan yang dikemukan oleh defendan. Dalam kes semasa, adalah jelas tiada apa yang menjadi penghalang melalui tindakan ataupun plantif telah dikatakan bertindak dengan tidak munasabah dan salah dalam manamatkan perjanjian kemudahan ataupun adanya penerimaan melalui tindakan oleh plaintif. Tiada apa-apa penerimaan oleh kedua-dua pihak untuk membuat penyelesaian disebabkan plaintif telah menolak tawaran penyelesaian secara jelas dan nyata (lihat perenggan 18–19).

(2) Plantif telah mengambil kira bayaran RM125,000 yang dibuat defendan. Jumlah tunggakan sebanyak RM1,830348.22 pada 10 Mei 2017 telah dibuktikan melalui penyata akaun bertarikh 8 September 2017 yang tidak dinafikan. Seksyen 16.28 perjanjian kemudahan dan seksyen 126 perjanjian jaminan dan idemniti dengan spesifik menyatakan bahawa defendan terikat pada klausa-klausa tersebut dan penyata akaun yang ditandatangani oleh pengurus, penolong pengurus dan mana-mana pegawai bank yang berkelayakan adalah bukti yang konklusif wujudnya hutang kepada bank melainkan defendan boleh membuktikan terdapatnya kesilapan (lihat perenggan 21).]

Notes

For cases on whether any triable issues raised, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 10371–10378.

Cases referred to

Alexander Brogden and Others v The Directors of the Metropolitan Railway Company (1877) 2 App Cas 666, HL (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Eckhardt Marine GMBH v Sheriff, High Court of Malaya, Seremban & Ors [2001] 4 MLJ 49, CA (refd)
Low Lup Piow & Ors v Lee Soh Hua [1983] 1 MLJ 304 (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, FC (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14 r 2

CY Chuah (Sidek Teoh Wong & Dennis) for the plaintiff.
Suren Rajah (Tun Yun Ming with him) (James Monteiro) for the defendants.

Lau Bee Lan J:

[1] Vide a notice of application dated 11 September 2017 ('encl 7') the plaintiff applied for summary judgment against D1 and D2 pursuant to O 14 of the Rules of Court 2012 ('the ROC 2012') of the following:

(a) the sum of RM1,830,348.22 due and owing to the plaintiff as at 10 May 2017;

(b) interest on the said sum of RM1,830,348.22 at 2.5%pa above the plaintiff's base lending rate (currently at 6.60%pa) calculated on daily rests basis ('prescribed rate') from 11 May 2017 until date of full settlement;

(c) additional interest on the principal sum of RM1,830,348.22 at the rate of 1% above the prescribed rate calculated from 11 May 2017 until the date of full settlement;

(d) costs on solicitor-client basis; and

(e) any further and other relief deemed fit and proper by the court.

[2] For the purpose of this application I am satisfied the preliminary requirements have been complied with ie: (i) the defendant has entered appearance; (ii) the statement of claim must have been served on the

defendant; and (iii) the affidavit in support of the application must comply with the requirements of r 2 of O 14 of the ROC 2012. Upon these considerations being satisfied, the plaintiff will have established a prima facie case and it comes entitled to judgment and the burden shifts to the defendant to satisfy the court why judgment should not be given against him (per George Seah FJ in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 at pp 301–302; [1984] 1 CLJ Rep 283 at p 285 e–f) and *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 (FC) at p 689 para [5]).

[3] It is also trite law that in a claim for summary judgment the burden is on the defendant to raise triable issues though a complete defence need not be shown; the determination of whether an issue is triable or not must necessarily depend on the facts or the law arising in each case as disclosed in the affidavit evidence before the court (per Mohamed Azmi SCJ in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 at p 408 A–B and further on the same p E–F) the Supreme Court held:

> Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

BRIEF FACTS

[4] Through a letter of offer dated 14 February 2005 ('letter of offer') and at the request of D1, the plaintiff granted the following credit facility of RM16m to the first defendant comprising:

(a) term loan facility with limit of RM7m;

(b) bridging facility — overdraft 1 for the principal of RM6m; and

(c) overdraft 2 for the principal of RM3m.

(collectively referred to as 'the facilities') (exh NTK1)

[5] Upon request by D1, the plaintiff agreed to revise the terms and conditions of the facilities as stated in the plaintiff's letters dated 14 April 2005 and 18 May 2005 ('supplementary letter') respectively received by D1 (exh NTK2).

[6] The terms and conditions of the letter of offer and the supplementary letter were reduced into a facility agreement dated 27 June 2005 ('the said facility agreement') in which D1 agreed to all the terms and conditions contained therein (exh NTK3).

[7] Through a guarantee and indemnity agreement dated 27 June 2005 (exh NTK4), D2, Tan Lai Kim and Tan Poh Chai jointly and severally agreed to guarantee the repayment of D1's liability upon the said terms and conditions contained in the guarantee and indemnity agreement.

[8] Subsequently, upon request by D1, the plaintiff agreed to alter the terms and conditions of the letter of offer through letters dated 18 April 2008, 18 January 2012, 5 June 2012, 1 February 2016 and 3 April 2017 respectively in which the plaintiff reduced the facilities to RM3m (exh NTK5).

(All exhibits mentioned above appear in the plaintiff's affidavit in support).

[9] By letter dated 13 June 2012 (exh RT2, defendants' affidavit in reply), the plaintiff had released and discharged the debenture, mortgages and Tan Lai Kim and Tan Poh Chai as guarantors of D1.

[10] The plaintiff through its solicitor issued a letter of demand dated 12 April 2017 to the defendants to claim the amount in excess of RM241,055.38 as at 10 April 2017 (exh NTK6, plaintiff's affidavit in support).

[11] After receipt of letter of demand dated 12 April 2017, the defendants made payment of RM125,000 to the plaintiff on 27 April 2017.

[12] Vide its solicitor's letter of termination cum recall dated 15 May 2017 (exh NTK7, plaintiff's affidavit in support), the plaintiff alleged that D1 breached the terms and conditions of the said facility agreement whereby it failed, neglected and/or refused to pay the amount in excess and terminated the facilities and demanded for the amount outstanding as prayed for in the summary judgment application which was filed thereafter on 23 June 2017.

[13] In response to the plaintiff's solicitor's letter of 15 May 2017, vide letter dated 25 May 2017, the defendants made another proposal of repayment plan, among others, that the defendants will continue to serve the monthly interest and a commitment to pay RM200,000 within three months of receipt of the plaintiff's approval to withdraw the termination and recall of the facilities (exh NTK8, plaintiff's affidavit in support).

[14] The plaintiff responded vide letter dated 13 June 2017 (exh NTK9, plaintiff's affidavit in support) rejecting the defendants' proposed offer to settle vide letter dated 18 April 2017 and proposed repayment plan of 25 May 2017 and with instructions to proceed with legal action for recovery of the outstanding amount.

[15] The defendants submitted there are two triable issues to dispute the plaintiff's claim, namely:

(a) acceptance of settlement of debt of RM241,000 by conduct; and

(b) unjust enrichment.

FINDINGS

Acceptance of settlement of debt of RM241,055.38 by conduct

[16] In respect of the first purported issue in its written submission, the defendants submitted:

— The Plaintiff had demanded a sum of RM241,055.38 as full settlement of the debt. Acting on this and in reliance of this, the Defendants made payment of RM125,000.00. The Plaintiff after receiving the money purported to reject the settlement but nevertheless kept RM125,000.00 paid in lieu of the settlement.

— Due to the failure of the Plaintiff to appreciate the fact that the Defendants had made part payments of RM125,000.00, the Plaintiffs through their solicitor's letters dated 13/6/2017 (exh.NTK-9) and 15/5/2017 (exh.NTK-11) respectively rejected the Defendants' settlement proposal without any reasonable explanation and proceeded with legal actions against the Defendants.

— The Plaintiff had also expressly admitted, by receiving of the said amount of RM125,000.00 on 27/4/2017 to settle the debt at RM241,055.38.

— Having in effect accepted settlement to be made at RM241,055.38, it is therefore unjust for the Plaintiff to now seek to claim the sum of RM1,830,348.22 from the Defendants.

— It is, therefore, the Defendants' case that the Plaintiff by their conduct is now estopped from claiming RM1,830,348.22 the debt of which in any event is denied.

[17] In support the defendants referred to the following cases:

(a) *Low Lup Piow & Ors v Lee Soh Hua* [1983] 1 MLJ 304 at p 307F left where the High Court held:

> There was no undue delay by the plaintiffs in trying to comply with the agreement. They were doing all they could reasonably do in the circumstances and I held that the defendant had acted unreasonably and wrongfully in terminating the agreement. The plaintiffs on their part had paid $300,000.00 as part payment ... and they were willing to pay the balance ...

(b) *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 348 E–F;

(c) *Eckhardt Marine GMBH v Sheriff, High Court of Malaya, Seremban & Ors* [2001] 4 MLJ 49 where the Court of Appeal at p 54 held:

> Fourthly, the act of acceptance may be either by words or by conduct or it may be partly by words and partly by conduct. *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 is a case of acceptance by conduct ...

(d) *Alexander Brogden and Others v The Directors of the Metropolitan Railway Company* (1877) 2 App Cas 666.

[18] With respect I find there is no merit whatsoever in the defendants' submission and the purported first issue is not a triable issue for the following reasons.

[19] I find none of the cases cited by the defendants are of assistance to them. In the present case it is obvious there cannot be estoppel by conduct nor can the plaintiff be said to have acted unreasonably and wrongfully in terminating the said facility agreement nor was there acceptance by conduct on the part of the plaintiff. This is because in the first place there is no acceptance of both the offers to settle as the plaintiff had rejected them outright in very clear and explicit terms:

(a) the defendants' offer to settle of 18 April 2017 (exh RT3, defendants' affidavit in reply) was rejected vide the plaintiff's letter dated 15 May 2017 (exh NTK11, plaintiff's affidavit in support);

(b) the defendants' offer to settle of 25 May 2017 (exh NTK8, plaintiff's affidavit in support) was rejected vide the plaintiff's letter dated 13 June 2017 which also made reference to the defendants' offer to settle of 18 April 2017 (exh NTK9, plaintiff's affidavit in support);

(c) the plaintiff's letter of demand of 12 April 2017 categorically states:

> We are therefore instructed by our client *to demand from you*, which we hereby do, *the payment of the aforesaid sum of RM241,055.38 as at 10 April 2017* together with the further interest and the sum of RM106.00 (inclusive of 6% GST) being the legal cost of this letter of demand be made to our client *within Seven (7) Days from the date hereof, failing which our clients shall terminate the above facility and recall the whole outstanding amount. For your information, the whole outstanding amount is RM1,941,055.38 as at 10 April 2017*. (Emphasis added.)
>
> It is crystal clear from quoted paragraphs of the said letter, the defendants are required to pay RM241,055.38 (the amount as at 10 April 2017) *by 19 April 2017*; otherwise the plaintiff is at liberty to terminate the said facility agreement and recall the whole outstanding

amount of RM1,941,05.38 (as at 10 April 2017). As the defendants had been so notified by the plaintiff, there is no basis for the defendants to allege that the plaintiff's conduct in terminating the said facility agreement and recalling the facilities as unreasonable and wrongful; and

(d) contrary to what the defendants contended (para 16, bullet 3), the acceptance of RM125,000 payment from the defendants as part payment is accepted 'on a without prejudice basis' and does not preclude the plaintiff from exercising its legal right to commence legal action on any balance sum outstanding. Therefore there is no admission by the plaintiff 'to settle the debt at RM241,055.38'. It is the defendants who were acting under a misapprehension.

Unjust enrichment

[20] In respect of the second purported issue, the defendants argued the sum of RM1,830,348.22 claimed by the plaintiff did not take into account the defendants' previous payment of RM125,000 and by the summary judgment application, the plaintiff sought to unjustly enrich itself. In support the defendants cited *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 at p 484 para [117].

[21] With respect I find the purported second issue is not triable for the following reasons. Contrary to what the defendants contended, the plaintiff had in fact taken into account the payment of RM125,000 made by the defendants and notwithstanding this said payment, the amount outstanding to the plaintiff is RM1,830,348.22 as at 10 May 2017 as is evident by the statement of account dated 8 September 2017 (exh NTK10, plaintiff's affidavit in support) which remained unchallenged. Section 16.28 of the said facility agreement and section 2.16 of the guarantee and indemnity agreement specifically provide that the defendants are contractually bound by the said clauses and a statement of account signed by manager, assistant manager and any other authorised officer of the bank is conclusive evidence of the debt due to the bank save if the defendants can prove there is manifest error (see *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282).

[22] Finally it is unconscionable of the defendants to now deny the plaintiff's claim having received and utilised the facilities.

[23] Since the defendants have not raised any triable issue which require to be ventilated at a trial, I allowed the plaintiff's application (encl 7) for summary judgment to be entered against the defendants in terms of prayers (a), (b), (c) and (e) ie, costs of RM4,000 to be paid by the defendants to the plaintiff (prayer (d) has been abandoned by the plaintiff).

Application allowed with costs of RM4,000 to be paid by defendant to plaintiff.

Reported by Mohd Kamarul Anwar